

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

ESTATE OF KOLAWOLE VICTOR)
KOIKE, Deceased by KOLAWOLE K.)
KOIKI and IYABODE KOIKE, Co-)
Administrators of the Estate of Kolawole)
Victor Koike, Deceased and KOLAWOLE)
K. KOIKI and IYABODE KOIKI, in their)
own right,) C.A. No. 02C-12-198-MMJ

Plaintiffs,)

v.)

SUGUNA PATIBANDA, M.D., H.)
BHAGTANI, M.D., KAREN)
CONNAUGHTON, M.D., CHRISTIANA)
CARE HEALTH SERVICES d/b/a)
CHRISTIANA HOSPITAL, DOCTORS)
FOR EMERGENCY SERVICE,)

Defendants.)

Submitted: February 22, 2005

Decided: March 2, 2005

ORDER

UPON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

DENIED

1. Harsha Bhagtani, M.D. (“Dr. Bhagtani”) moves this Court for Summary Judgment in this case which arises from a claim for medical negligence. Kolawole K. Koiki and Iyabode Koiki (“Plaintiffs”) are the Co-Administrators of the Estate of Kolawole Victor Koike (“Victor”). Victor was admitted to Christiana Hospital by defendant Dr. Suguna Patibanda, Victor’s primary care physician on February 16, 2001. Dr. Bhagtani was the resident in charge. Victor came under the care of Dr. Bhagtani during the evening hours of February 16 and morning hours of February 17, 2001.

2. Plaintiffs’ allege that Victor’s death on February 20, 2001 was the result of the negligence and malpractice of defendants. Plaintiffs have identified Marlene J. Wust-Smith, M.D. (“Dr. Wust-Smith”) as their standard of care expert witness. Plaintiffs also have produced the Summary Opinion of Dr. Edward James O’Rourke (“Dr. O’Rourke”) on the issue of causation.

3. Dr. Bhagtani claims her treatment of Victor was limited in duration from the time Victor was admitted on February 16th at approximately 5:00 p.m., until the time Dr. Bhagtani was relieved of duty at the end of her shift on February 17th at 8:00 a.m.

4. Dr. Bhagtani alleges that it is undisputed that during this period:
(a) no physician, nurse, or other staff member ever reported to Dr. Bhagtani any

indication that Victor's condition was deteriorating; (b) Victor's temperature continued to decline, and; (c) Victor's overall condition improved.

5. Dr. Bhagtani asserts that Plaintiffs' standard of care witness Dr. Marlene J. Wust-Smith's opinion letter does not specifically address the care or treatment offered by Dr. Bhagtani. Rather, it is directed toward Christiana Hospital's "resident staff physicians," who include Dr. Bhagtani.

6. Dr. Bhagtani also argues that Dr. O'Rourke's causation opinion is insufficient as a matter of law as it fails to establish a causal connection between any deviation from the applicable standard of care by Dr. Bhagtani and the cause of Victor's death.

7. Plaintiffs claim, however, that Dr. Wust-Smith identified in both her summary opinion report of February 18, 2002, and her deposition of September 8, 2004, specific breaches in the standard of care by Dr. Bhagtani. Additionally, Dr. O'Rourke's opinions as to causation provide the necessary causal link between the alleged deviation in the standard of care and the death of Victor.

8. To determine medical negligence, Plaintiffs must present expert testimony concerning standard of care and causation. With regard to standard of care, Plaintiffs present the affidavit of Dr. Wust-Smith. With regard to causation, Plaintiffs present the Summary Opinion of Dr. O'Rourke.

9. Dr. Wust-Smith's affidavit lists the following as one of the "deviations from accepted standard of medical care:"

(6) Christiana Hospital's resident staff physicians' failure to order a comprehensive work-up of Kolawole's high fevers after his admission to Christiana Hospital, particularly with a negative RSV nasal wash. The standard of care is to rule-out bacteremia in any child with a high fever under the age of 24 months, particularly a child without an obvious identified source for infection. The standard of care would dictate that Dr. Patibanda be notified of Kalawole's high fevers, negative RSV nasal wash and progressive lethargy.

10. Dr. Wust-Smith's deposition is more specific with regard to Dr. Bhagtani. When asked whether any specific standard of care was breached between the time of admission and 9:00 a.m in the morning (the time when Victor was under Dr. Bhagtani's care), Dr. Wust-Smith responded: "I think that the first clear deviation is when an RSV swab comes back as negative and you still have an acutely febrile, tachycardic, tachypneic child." When further asked why that was a breach, Dr. Wust-Smith answered: "It's a breach because we really now have a child with respiratory distress of unclear etiology. It could be bronchiolitis. It could be pneumonia. It could be sepsis. There's more in the differential than bronchiolitis."

11. It is clear that the questions put to Dr. Wust-Smith refer to the resident physicians as well as to Dr. Patibanda. The word "resident" is mentioned

in some of the questions and answers. For example, when asked what should have been done when the RSV wash came back negative, Dr. Wust-Smith responded: “I think the residents could either have acted independently because within the standard of their practice to order further tests on a baby, that you don’t have to call an attending, you know, to describe every little thing you are doing. There are certain things that are kind of, quote unquote, no brainers.”

12. One question mentions Dr. Bhagtani by name. When asked: “And it is your opinion that upon receipt of the negative result, Dr. Bhagtani should have done what?” Dr. Wust-Smith responded: “Should have done a further workup to determine the etiology of why this child was in the hospital and having difficulty breathing and a fever.”

13. With regard to causation, paragraph 3 of Dr. Edward James O’Rourke’s (“Dr. O’Rourke”) opinion states:

Had the risk of serious bacterial infection been recognized on the evening of February 16, management would have included diagnostic and therapeutic measures to identify and treat bacteria infection. In my opinion and based on reasonable medical probability, had parenteral antibiotics been administered on the evening of February 16 or even in the a.m. of February 17, the patient would have survived.

14. Summary judgment is appropriate when the moving party has shown that there are no genuine issues of material fact and that the moving party is

entitled to judgment as a matter of law.¹ In considering such a motion, the Court must evaluate the facts in the light most favorable to the non-moving party.² Summary judgment will not be granted under circumstances where the record reasonably indicates that a material fact is in dispute or if it seems desirable to inquire more thoroughly into the facts in order to clarify the application of law to the circumstances.³

15. After considering the facts in light most favorable to the non-moving party, the Court finds that questions of fact must be resolved by the jury, including: (a) whether a third year resident has a duty or the authority to deviate from, or to supplement, an admitting physician's treatment plan; (b) whether the admitting physician established and communicated a treatment plan; (c) who was responsible for "management" of the patient within the meaning of paragraph 3 of Dr. O'Rourke's opinion; (d) whether Dr. Bhagtani's conduct was in breach of the relevant standard of care; and (e) whether any breach of the standard of care by Dr. Bhagtani is causally connected to Victor's death.

¹*Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).

² *Id.*

³ *Ebersole v. Lowengrub*, 180 A.2d 467, 468-69 (Del. 1962).

THEREFORE, Defendant's Motion for Summary Judgment with Respect to Plaintiff is hereby **DENIED**.

IT IS SO ORDERED.

The Honorable Mary M. Johnston

ORIGINAL: PROTHONOTARY'S OFFICE - CIVIL DIV.